North Hills Office Services, Inc. *and* Service Employees International Union, Local 32B-J.[1] Case 29–CA–25930

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 14, 2005, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief to which the Charging Party filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief to which the Respondent filed an answering brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions except as specified below and to adopt the recommended Order as modified and set forth in full below.[4]

We adopt the judge's findings, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(1) by: coercively questioning night-shift employees about their union activities on June 30, 2003;[5] directing night-shift employees to remove their union T-shirts on July 1, and implementing a new policy on July 2 requiring employees on the night shift to wear a uniform;[6] implementing a "no-talking" rule in early August; and directing off-duty employees to stop distributing union leaflets in a nonworking area in August and on October 14.[7] We similarly adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by issuing a warning to employees Ana Joya, Sandra Hernandez, and Maria Mendoza on July 1 for distributing union literature during "company time."

The judge also found that the Respondent violated Section 8(a)(1) by changing day-shift employees Esmerelda Leon and Julio Jimenez' lunch schedules so that they ate lunch at separate times and violated Section 8(a)(3) and (1) by discharging employees Joya and Hernandez. We agree with the judge as we further explain below. For the reasons stated below, however, we reverse the judge's finding that the Respondent violated Section 8(a)(1) by distributing the September 22 edition of its "Plain Talk" newsletter to employees.[8]

The judge failed to address in his decision numerous allegations of violations raised by the General Counsel in the complaint. The General Counsel excepted to the judge's failure to address two of those allegations.[9] We

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] There were no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) by granting a wage increase in order to dissuade its employees from supporting the Union. There were also no exceptions to the judge's recommended dismissal of allegations that the Respondent unlawfully: (1) directed and induced employees to sign a petition withdrawing their membership from the Union; (2) changed employees Esmerelda Leon and Julio Jimenez' work hours; (3) changed Jimenez' job duties; (4) prohibited Leon from removing soda cans from the building; and (5) refused to change employee Ana Joya's job duties.

[3] The Respondent excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.,* 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

Additionally, the record indicates that many of the Respondent's employees do not speak English fluently and may have difficulty understanding a notice posted in English. Accordingly, we shall order that the Respondent post the notice to employees in both English and Spanish. *Flying Foods*, 345 NLRB 101 fn. 3 (2005), and cases cited therein.

[5] All dates refer to 2003, unless otherwise indicated.

[6] An employer's workplace rule violates Sec. 8(a)(1) when it is promulgated in response to union activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Here, the Respondent's uniform rule followed on the heels of its unlawful directive to employees to remove their union t-shirts and had the same objective—preventing the display of union insignia. In these circumstances, we find that the Respondent's uniform policy was motivated by and was in response to those activities.

[7] We find that the area between the building's entrances and the parking lot or sidewalk where the handbilling in question occurred was not a part of the Respondent's work area. See, e.g., *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000) (holding that an area outside of an employer's facility is not a "work area" if the work performed there is merely incidental to the employer's main function). For this reason, the Respondent could not prohibit off-duty employee handbilling in that area. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962) (holding that an employer can limit distribution of union materials in its "work areas"). In finding this violation, we do not rely on the judge's statement that the Respondent's directive to off-duty employees to stop handbilling on these occasions was unlawful for the additional reason that the directive carried with it a threat of discipline.

[8] Member Liebman dissents on this issue. See fn. 21 infra.

[9] There were no exceptions to the judge's failure to address allegations that the Respondent unlawfully: (1) threatened an employee with discharge in retaliation for distributing union literature (complaint pars. 15(b) and 17(c)); (2) interrogated an employee about a union meeting (complaint par. 18(a)); (3) impliedly threatened an employee with unspecified reprisals for attending a union meeting (complaint par. 18(c)); (4) threatened to decrease an employee's working hours if he or she refused to sign a petition withdrawing membership in the union and promising not to attend future union meetings (complaint par. 19(b)); (5) interrogated an employee about the reasons for her activities on

find that the Respondent violated Section 8(a)(1) by offering to assist employee Mendoza in withdrawing her membership in the Union but we dismiss the allegations that the Respondent violated Section 8(a)(1) by conveying to employees an impression of surveillance.[10]

1. The judge found that the Respondent violated Section 8(a)(1) on or about July 3 by changing the schedules of day-shift employees Esmerelda Leon and Julio Jimenez so that they ate lunch at separate times. The judge's decision, however, contains insufficient analysis to support his conclusion. Nevertheless, for the reasons that follow, we agree that the schedule change violated Section 8(a)(1).

Leon and Jimenez were open union supporters, and the Respondent was aware of their union activities. In response to Operations Manager Eddie Matos' coercive questioning of employees on June 30, Leon identified herself as a former member of Local 32B-J. Six pro-union employees, including Leon and Jimenez, wore union T-shirts to work on July 1, and again on July 2, despite Building Supervisor Alfonso Riano's July 1 unlawful directive that they stop wearing the shirts. After employees wore the union T-shirts again on July 2, the Respondent unlawfully implemented a new uniform policy. The following day, Leon's and Jimenez' lunch schedule was changed, depriving them of their opportunity to meet and talk to each other during their lunchbreak. These facts are sufficient to satisfy the General Counsel's initial burden to show that Leon's and Jimenez' Section 7 activity was a substantial or motivating factor in the Respondent's decision to change their lunch schedules. *Manno Electric*, 321 NLRB 278, 280–281 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398–403 (1982).[11] Thus, the focus of our remaining inquiry is whether the Respondent demonstrated that it would have changed the employees' lunch schedules even in the absence of their Section 7 activities.

The Respondent asserts that it changed the employees' lunch schedules in July because the employees were taking their lunches together away from the building and because of an incident where the employees were unavailable to answer a service call. The Respondent further asserts that it made this change at the request of its client, Linque Management. The judge found that there was no real connection between the Respondent's July change in lunch schedules and the Respondent's need to always have an employee available to respond to service calls. We agree.

According to the Respondent, it changed the employees' lunch schedules because of an incident, which occurred after lunch, in September or October. Linque Management Building Manager Robert Kinsley received a call about an overflowing toilet and was unable to locate either of the Respondent's two day-shift employees because they left work early. This incident, however, occurred months after the July schedule change and not as a result of the employees eating lunch together. It, therefore, provides no justification for the schedule change.[12]

The record also belies the Respondent's contention that employee availability to respond to service calls during the employees' lunchbreak was a problem. Whenever Riano needed assistance during the employees' lunchbreak, one of the employees would always stop eating lunch and respond to his call. There is no evidence that Leon or Jimenez had taken lunch away from the building prior to July, or at any time for that matter. Similarly, there is no evidence that these employees ever failed to respond to lunchtime service calls.

In these circumstances, we find that the Respondent failed to satisfy its rebuttal burden to show that it would have changed the employees' lunch schedules even in the absence of their Section 7 activity. Accordingly, we affirm the judge's conclusion that the change in lunch schedules violated Section 8(a)(1).[13]

2. We also agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Joya and Hernandez on October 14. In finding that the discharges were unlawful, however, the judge failed to clearly explain his *Wright Line* analy-

behalf of the union and threatened her with discipline for those activities (complaint par. 21); and (6) threatened an employee with discipline in retaliation for his or her activities on behalf of the union (complaint par. 23). Accordingly, we shall dismiss these complaint allegations.

[10] Member Liebman dissents on this issue. See fn. 24 infra.

[11] Regarding the *Wright Line* analysis, Member Schaumber notes that the Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation analysis, Member Schaumber agrees with this addition to the formulation.

[12] There were no exceptions to the judge's factual finding that the schedule change occurred in July.

[13] There were no exceptions to the judge's failure to find that the change also violated Sec. 8(a)(3) as alleged.

sis or fully analyze the evidence presented by the Respondent in support of its *Wright Line* rebuttal defense. Having conducted the *Wright Line* analysis, we nevertheless find the Respondent's rebuttal evidence unavailing for the reasons set forth below.

The Respondent has a contract with Linque Management to provide cleaning services in a commercial office building. Although not mentioned by the judge in his decision, in either August or October, Linque Management's building manager, Kinsley, told the Respondent's vice president of operations, Tom Pellegrino, that a tenant had complained about an argument between Riano and employees in a public lobby on the third floor of the building.[14] Kinsley testified that during his conversation with Pellegrino about the incident, he told Pellegrino not to let this happen again and that if there were further disturbances in the building, the Respondent might need to make some personnel changes on the night shift. At no time during the conversation did Kinsley indicate that the Respondent would lose its cleaning contract if another incident occurred.

On October 14, from approximately 5 to 6 p.m., Joya, Hernandez, and Mendoza distributed union handbills to persons leaving the building. Riano came outside and directed them to stop handbilling.[15] They did not stop distributing leaflets, however, until just prior to the beginning of their shift at 6 p.m.

When Joya came into the building after handbilling, she asked Riano for an update on a request for a raise she made the day before. This discussion occurred in the basement by the Respondent's supply closet and in the presence of other employees. No tenants were present. According to the credited testimony, Riano began yelling and screaming at Joya, telling her that she should call the office about the raise and that she could get the number from the same people who gave her the union leaflets. Riano also said that because Joya was "good at handing out papers, go get the answer [about a raise] someplace else." Hernandez intervened on behalf of Joya and told Riano to stop yelling at Joya. Riano told Hernandez to keep her comments to herself and go to work. At no point during the incident did any employee yell or curse, as Riano conceded during his testimony.

Riano, however, called Pellegrino and Matos and told them that the employees were cursing him and that he felt that he was losing control of the employees. Riano also prepared written warnings for Joya and Hernandez. When Pellegrino and Matos arrived at the building at approximately 6:30 or 7 p.m., they discovered that Joya and Hernandez had two previous warnings. Accordingly, Pellegrino, Matos, and Riano discharged Joya and Hernandez at the end of the shift around 9 p.m.

There is substantial record evidence of these employees' union activities and the Respondent's knowledge of those activities. The discharges also came immediately following Joya's and Hernandez' participation in lawful union handbilling outside of the building. Considering the numerous other violations found by the judge and adopted by the Board in this case, there is substantial evidence of the Respondent's animus to the employees' Section 7 activities, including those of Joya and Hernandez. Accordingly, we find that the General Counsel has satisfied his initial burden to show that Joya's and Hernandez' union activities were a substantial or motivating factor in their discharge. *Manno Electric*, supra; *Wright Line*, supra. Thus, again the focus of our remaining inquiry is whether the Respondent demonstrated that it would have discharged Joya and Hernandez even in the absence of their union activities.

The Respondent contends that it discharged Joya and Hernandez because Linque Management had informed it that further disturbances in public areas of the building could not happen again, and that it "acted solely to protect its contract with its client."[16] The record, however, does not support the Respondent's contention.

While Linque Management Building Manager Kinsley told Pellegrino not to let similar incidents occur again, Kinsley did not threaten to end their contractual relationship if further incidents occurred.[17] Even assuming another incident in a public area of the building might have impacted the parties' relationship, the October 14 incident did not occur in public. It occurred in the building's basement outside of the presence of the building's tenants.

The Respondent's proffered reason for the discipline is further undercut by the credited testimony that Riano, not Joya or Hernandez, did the yelling and screaming. Riano's repeated references during the incident to the em-

[14] Kinsley specifically named the tenant. The tenant, however, testified that she never lodged such a complaint with Kinsley. Kinsley also testified that his conversation with Pellegrino occurred in August while Pellegrino testified that it occurred in October.

[15] As discussed above, we adopt the judge's finding that Riano's directive was a violation of Sec. 8(a)(1).

[16] See R. Br. in Support of Exceptions, p. 24.

[17] The Respondent claims that it disciplined the employees on October 14 because Kinsley had complained earlier in October about an argument between Riano and employees in a public area of the building. As discussed above, however, Kinsley testified that he complained to Pellegrino in August. This unexplained inconsistency in the evidence purportedly supporting the Respondent's justifications for its actions undercuts the Respondent's *Wright Line* defense.

ployees' handbilling strongly suggests that the real reason for the discipline was that Riano was upset by the handbilling and the employees' defiance of his unlawful directive to stop it. In these circumstances, we find that the Respondent has not satisfied its rebuttal burden to show that it would have disciplined the employees even in the absence of their union activities. This evidence would also support a finding that the Respondent's proffered reason for the discipline is pretextual.[18] Accordingly, we affirm the judge's conclusion that the discharges violated Section 8(a)(3) and (1) of the Act.[19]

3. The judge found that the Respondent violated Section 8(a)(1) by distributing the September 22 edition of its "Plain Talk" newsletter to employees. The judge based his finding on his understanding that the newsletter had previously been found unlawful by the Board in *North Hills Office Services*, 344 NLRB 1083, 1097 (2005) (*North Hills I*). We reverse.

Contrary to the judge's statement, the Board did not find that the September 22 newsletter was unlawful in *North Hills I*.[20] Further, for the reasons that follow, we find that distributing the newsletter to employees did not violate the Act.

The newsletter contained the following statement about the Union:

> Many of you must have read newspapers regarding the bigotry and the bias crimes committed against Hispanic workers in Farmingville. 32BJ has shown their true colors when they went to the Federal Labor Board with a group of employees and told the Federal Labor Board that at North Hills many of the hardworking Hispanic people we employ are undocumented. 32BJ is creating problems for hardworking Hispanic people! 32BJ is trying to get the INS to threaten North Hills employees. You have to ask yourself why did the Union engage in such gutter tactics. When you see a 32BJ representative or a sympathizer, ask them why they told the Labor Board that the people working at North Hills are undocumented. To verify that they told this to the Labor Board, you need only call the attorney at the Board . . . . This is the most unprincipled tactic that any union can use and only a union as unscrupulous as 32BJ would engaged [sic] in this kind of activity.

We recognize that threats involving immigration or deportation can be particularly coercive. Such threats place in jeopardy not only the employees' jobs and working conditions, but also their ability to remain in their homes in the United States. *Smithfield Packing Co.*, 344 NLRB 1, 9 (2004) (citing *Viracon, Inc.*, 256 NLRB 245, 247, 252–253 (1981)); *Mid-Wilshire Health Care Center*, 342 NLRB 520, 524 (2004). Here, the Respondent did not make a threat. It represented to employees its view of what the Union had done and what the Union allegedly planned on doing. The newsletter did not say that the Respondent had taken or would take any action regarding employees' immigration status. Because employees would reasonably understand that the newsletter did not refer to any action within the control of the Respondent, we find that it was not an unlawful threat. See *Smithfield Packing*, supra; *Pacific Grain Products*, 309 NLRB 690, 691 (1992) (rejecting contention that union official's statement was threat because union official did not have the ability to carry out the alleged threat). Consequently, we find that the newsletter referring to the Union's conduct did not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. See, e.g., *Smithfield Packing*, supra (dismissing allegation that employer threatened employees by saying that if employees voted the union in, the union would "turn Immigration on the Latinos" because statement did not involve any action within the control of employer). Accordingly, we shall dismiss this allegation.[21]

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[18] In making this finding, we do not rely on the judge's characterization of the standard for determining whether an employer's asserted business justification for an adverse employment action is pretextual. A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel's initial showing. *ADS Electric Co.*, 339 NLRB 1020, 1023 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

[19] We specifically disavow the judge's gratuitous and improper comment that Spanish-speaking men have an overblown sense of machismo.

[20] See *North Hills I*, 344 NLRB at 1084 fn. 10.

[21] Our dissenting colleague contends that the newsletter's reference to the "Federal Labor Board" would reasonably tend to discourage employees from turning to the Board for assistance or from cooperating with the Board for fear of being reported to immigration authorities. We note, however, that the newsletter does not predict adverse consequences should employees seek out Board assistance or cooperate with Board investigations. On the contrary, the newsletter expressly encouraged employees to speak with Board agents so that they could confirm, for themselves, that the Union had taken the conduct referred to in the newsletter. Thus, unlike our colleague, we do not find that the newsletter discouraged employees from dealing with the Board.

Contrary to the majority, Member Liebman would find that the Respondent's distribution of the September 22 "Plain Talk" newsletter violated Sec. 8(a)(1), particularly in the context of the Respondent's other, unlawful antiunion conduct, as found by the Board. In Member Liebman's view, the newsletter's repeated references to the "Federal Labor Board," in connection with the Union's asserted efforts to create immigration-law difficulties for employees, would discourage employees from bringing claims to the Board and from cooperating with the

4. The complaint alleged that the Respondent violated Section 8(a)(1) by offering to assist employee Maria Mendoza in withdrawing her membership in the Union. The judge failed to address this complaint allegation and the General Counsel excepted to the judge's failure to do so. We find merit in the General Counsel's exception.

During the July 1 meeting where Mendoza received a discriminatory warning for distributing union literature during "company time,"[22] Matos asked her whether she knew that employees already had a union, referring to the incumbent union, NOITU. Mendoza responded that she knew there was a union because they took $15 in dues from her paychecks. Matos then said that he was "going to help [Mendoza] to get out of 32B-J" but that "if [she] had signed some papers it was going to be difficult to get [her] out of 32B-J." At no point during his testimony did Matos deny making these statements.

The General Counsel contends that Matos' statements constitute an unlawful offer of assistance to withdraw membership in the Union. We agree. "An employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *R. L. White Co.*, 262 NLRB 575, 576 (1982) (footnote omitted). Nevertheless, an employer may not "exceed the permissible bounds of providing ministerial or passive aid in withdrawing from union membership." *Chelsea Homes*, 298 NLRB 813, 834 (1990), enfd. mem. 962 F.2d 2 (2d Cir. 1992) (finding violation when employer provided sample form and preaddressed envelope). The Board may also find such statements unlawful when made in the context of contemporaneous unfair labor practices. *Air Flow Equipment, Inc.*, 340 NLRB 415, 418 (2003); see generally *Register Guard*, 344 NLRB 1142, 1143–1144 (2005).

Here, Matos offered Mendoza assistance in withdrawing her membership in the Union in the context of several contemporaneous unfair labor practices specifically directed at Mendoza: on June 30, Matos coercively interrogated Mendoza about her union activities; on July 1, Building Supervisor Riano unlawfully directed Mendoza, as well as other employees, to remove a union t-shirt; on July 1, Riano and Matos issued Mendoza a discriminatory warning contemporaneously with Matos' offer to assist her to withdraw her membership in the Union; and on July 2, Riano unlawfully implemented a new uniform rule in response to Mendoza's, as well as other employees', union T-shirts. In these circumstances, Mendoza would reasonably construe Matos' offer of assistance as an implicit invitation to withdraw her membership in the Union. Coming on the heels of the discriminatory discipline issued to Mendoza for participating in union activities, the offer also reasonably presented the possibility to Mendoza that Matos would force her to withdraw her membership in the Union or suffer further discipline. Matos' statement, therefore, created a situation where Mendoza would tend to feel peril in refusing Matos' offer. Accordingly, Matos' statement violated Section 8(a)(1). *R. L. White Co.*, supra.

5. The complaint alleged that on two separate occasions the Respondent violated Section 8(a)(1) by conveying to employees an impression of surveillance. The judge's decision did not address these complaint allegations and the General Counsel excepted to the judge's failure to do so. We find no merit in the General Counsel's exceptions.

Leon testified that during a July 1 meeting, Building Supervisor Riano told Leon that two of her coworkers had reported to Riano that Leon drove them to a union meeting on June 29. Riano did not deny making this statement, but did testify that he never asked any employee to provide him with any information about the June 29 union meeting.

Mendoza testified that, during the July 1 meeting where she was given a discriminatory warning for distributing union literature during "company time," Matos told her that two of her coworkers had informed him that Mendoza was distributing union literature during working hours. Matos did not deny making this statement to Mendoza.

The General Counsel contends that where an employer informs an employee that coworkers are reporting on their union activities, the employer creates an impression of surveillance. We disagree. The gravamen of an impression of surveillance violation is that employees are led to believe that their union activities have been placed under surveillance *by the employer*. *South Shore Hospital*, 229 NLRB 363 (1977), enfd. in relevant part 571 F.2d 677 (1st Cir. 1978) (emphasis added). Volunteering

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Board, for fear of being reported to immigration authorities. Notably, the newsletter was attached to employees' paychecks and included a large picture of a rat. Employees who both faced the real possibility of employer reprisals and who were discouraged from turning to the Board for protection would reasonably tend to be chilled in their exercise of Sec. 7 rights. The Board "must be careful to ensure that employees are not improperly discouraged from seeking to vindicate their legal rights, including access to the Board." *Regal Cinemas, Inc.*, 334 NLRB 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003).

[22] As discussed above, we adopt the judge's finding that the warning issued to Mendoza on this occasion violated Sec. 8(a)(3) and (1).

information concerning an employee's union activities by other employees such as occurred here, particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance. See, e.g., *Register Guard*, supra at 1144 (finding that employer's statements indicating employees had volunteered information about coworkers' union activities did not create impression of surveillance); *Rock-Tenn Co.*, 315 NLRB 670, 682 fn. 19 (1994), enfd. 69 F.3d 803 (7th Cir. 1995), and overruled on another point by *Chelsea Industries*, 331 NLRB 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002).

We recognize that Matos' statements did not take place in circumstances entirely free of unlawful conduct. Even if Matos' statements are viewed in light of the Respondent's unlawful conduct, however, they do not establish impressions of surveillance because Matos clearly indicated that another employee was the source of his information about Mendoza's and Leon's union activities. Cf. *SKD Jonesville Division L.P.*, 340 NLRB 101, 102 (2003) (finding that supervisor's statement that he heard that employee was going to organize, during conversation that included an unlawful threat of retaliation, did not establish an unlawful impression of surveillance).[23] Accordingly, we shall dismiss these complaint allegations.[24]

AMENDED CONCLUSIONS OF LAW

1. Replace the judge's Conclusion of Law 10 with the following:

"10. By offering an employee assistance to withdraw her membership in the Union in the context of contemporaneous unfair labor practices, the Respondent has violated Section 8(a)(1) of the Act."

2. Replace the judge's Conclusion of Law 13 with the following:

"13. The Respondent has not violated the Act in any other manner."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, North Hills Office Services, Inc., Woodbury, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to discharge or impose other reprisals on employees or issuing warnings to or discharging employees because of their union membership, activities, or support.

(b) Interrogating employees about their union membership or activity.

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[23] For this reason, *Sam's Club*, 342 NLRB 483, 483–484 (2004), cited by our dissenting colleague, infra, is distinguishable. In *Sam's Club*, the employer's statement revealed the employer's knowledge of an employee's union activities but did not reveal the source of the employer's information. Here, Matos' statement made clear that his source was another employee.

Although Chairman Battista agrees that this case can be distinguished from *Sam's Club*, he dissented in *Sam's Club*, finding that the evidence there failed to establish that employees were under the impression that the employer was "surreptitiously watching" them or "spy[ing] upon them."

[24] Contrary to the majority, Member Liebman would find that the Respondent unlawfully created an impression of surveillance on both occasions. The test for whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, the employee reasonably could conclude from the statement in question that his protected activities are being monitored. *Sam's Club*, supra. Here, the circumstances include the Respondent's other unlawful conduct directed against the employees involved, as well as their coworkers.

The July 1 statement of Operations Manager Riano to employee Leon—that Riano knew from Leon's coworkers that he had driven them to a June 29 union meeting—occurred in a conversation during which Leon was issued an unlawful warning and shortly after Leon and other employees were unlawfully interrogated about the union meeting. On the same day, the Respondent distributed a newsletter that, as the Board has found in a previous case (*North Hills Office Services*, 344 NLRB at 1084), created an unlawful impression of surveillance with respect to the union meeting.

The July 1 statement of Supervisor Matos to employee Mendoza—that he had received reports, from Mendoza's coworkers, that she was handing out union literature on company time—was made in similarly coercive circumstances. Mendoza was contemporaneously issued an unlawful warning for the reported conduct. Shortly before, on June 30, Matos had unlawfully interrogated Mendoza about her union activities.

The majority finds no violation because "[v]olunteering information concerning an employee's union activities by other employees such as occurred here, particularly in the absence of evidence that management solicited that information, does not create an impression of surveillance." Contrary to the majority, the fact that the Respondent's supervisors told Leon and Mendoza that other employees were the source of the information but did not indicate to Leon or Mendoza just *how* or *why* management received this information about their union activities supports a finding of a violation under *Sam's Club*, supra (relying on fact that respondent's manager "never revealed how he came by the information."). Under the circumstances here—including unlawful interrogations and related unfair labor practices—employees in the position of Leon and Mendoza would reasonably suspect that the information concerning their union activities had *not* been volunteered by their fellow employees, but rather had been extracted coercively, in connection with the Respondent's efforts to monitor employees. Id. at 483–484. In addition, the majority's position fails to take into account that no innocent explanation for the comments of Riano or Matos was communicated to Mendoza or Leon. Indeed, "[t]here is no record evidence of a legitimate purpose for making the statement[s]." *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998), enfd. 8 Fed. Appx. 180 (4th Cir. 2001).

(c) Directing employees on the night shift to remove union T-shirts and requiring them to wear company uniforms that substantially obscured the union T-shirts.

(d) Requiring employees to take separate lunchbreaks in order to discourage them from engaging in union activities.

(e) Prohibiting employees from talking to each other during working hours in order to discourage their union activities.

(f) Directing off duty employees not to engage in union leafleting activity in the parking lot.

(g) Offering employees assistance to withdraw their membership in the Union in the context of contemporaneous unfair labor practices.

(h) Giving wage increases to employees in order to induce them to refrain from joining or assisting Local 32BJ.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Order, offer Ana Joya and Sandra Hernandez full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Ana Joya and Sandra Hernandez whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and warnings of Ana Joya, Sandra Hernandez, and Maria Mendoza and within 3 days thereafter, notify them in writing, that this has been done and that the discharges and warnings will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Garden City, New York, copies of the attached Notice marked "Appendix"[25] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise retaliate against employees for supporting Service Employees International Union, Local 32B-J, or any other labor organization.

WE WILL NOT coercively question employees about their union support or activities.

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT direct employees on the night shift to remove union T-shirts and require them to wear company uniforms that substantially obscure the union T-shirts.

WE WILL NOT require employees to take separate lunchbreaks in order to discourage them from engaging in union activities.

WE WILL NOT prohibit employees from talking to each other during working hours in order to discourage their union activities.

WE WILL NOT direct off duty employees not to engage in union leafleting activity in the parking lot.

WE WILL NOT offer employees assistance in withdrawing their membership in the Union.

WE WILL NOT give wage increases to employees in order to induce them to refrain from joining or assisting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Ana Joya and Sandra Hernandez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Ana Joya and Sandra Hernandez for any loss of pay they may have suffered as a result of our discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and warnings of Ana Joya and Sandra Hernandez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and warnings will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning of Maria Mendoza, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.

NORTH HILLS OFFICE SERVICES, INC.

Amy Gladstone Esq., for the General Counsel.
Alan Pearl Esq. and *Nancy M. Hark Esq.,* for North Hills.
Katchen Locke Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on various days in June and August 2004. The charge in Case 29–CA–25930 and the first amended charge were filed against North Hills on October 29, 2003, and January 21, 2004. The charge and amended charge in Case 29–CA–25996 were filed against North Hills on December 4, 2003, and January 8, 2004.

A consolidated complaint issued on March 12, 2004, but on June 8, 2004, the Regional Director approved a settlement agreement between the Union and Linque, which resulted in the withdrawal of the charge in Case 29–CA–25996, the elimination of that company as a Respondent eliminated the illegal discharge allegations relating to Julio Jimenez and Esmerelda Leon. As amended, the allegations that remained are as follows:

1. That on June 30, 2003, the Respondents, by Eddie Matos, its operations manager, (a) interrogated employees about Local 32BJ, (b) induced and offered to assist an employee to withdraw membership from the Union, and (c) threatened to discharge an employee for distributing union literature.

2. That on June 30, 2003, Respondents, by Alfonso Riano, (a) directed employees to remove T-shirts with union logos, (b) threatened employees who refused to remove these T-shirts, (c) conveyed the impression that employees' union activities were under surveillance, (d) threatened an employee with discharge because he/she distributed union literature, (e) directed employees to refrain from distributing union literature, and (f) instituted an overly broad no-solicitation/distribution rule, prohibiting employees from distributing literature during working hours.

3. That on July 1, 2003, the Respondent, for discriminatory reasons issued warnings to Sandra Hernandez, Maria Mendoza, and Ana Joya.

4. That on or about July 2 or 3, the Respondent required employees to wear company uniforms which covered up and obscured the union T-shirts.

5. That on July 8, 2003, the Respondent, by Alfonso Riano, (a) interrogated an employee about attending a union meeting, (b) conveyed an impression of surveillance, (c) impliedly threatened an employees with reprisals for attending a union meeting, (d) directed and induced employees to sign a petition withdrawing their membership in the Union, and (e) threatened to eliminate night-shift hours if an employee refused to sign the petition.

6. That on July 20, 2003, the Respondent for discriminatory reasons, changed the lunchbreak and shift schedules of Julio Jimenez and Esmerelda Leon.

7. That in late July 2003, the Respondent, for discriminatory reasons instituted a new rule prohibiting employees from talking to each other while working.

8. That in late July 2003, the Respondent by Riano, told employees who were engaged in leafleting in the parking lot, that they could not do so because it was private property.

9. That on August 1, 2003, the Respondent, by Riano, for discriminatory reasons, refused to change Ana Joya's job responsibilities so that she no longer had to clean bathrooms.

10. That on or about August 2003, the Respondent for discriminatory reasons, made Jimenez mop the stairs 5 days a week.

11. That on September 22, 2003, the Respondent by its newsletter, made false statements regarding an alleged attempt by the Union to report employees to the Immigration and Naturalization Service (INS).

12. That on or about September 29, 2003, the Respondent, by Alfonso Riano, interrogated and threatened employees regarding their union activities.

13. That on September 29, 2003, the Respondent, for discriminatory reasons, prohibited Leon from removing soda cans as she had been permitted to do in the past.

14. That on or about October 14, 2003, the Respondent, by Riano told employees to stop distributing union literature at the back entrance to 990 Stewart Avenue and threatened employees with discharge if they continued to do so.

15. That on October 14, 2003, the Respondent, for discriminatory reasons, issued a warning to Sandra Hernandez and Ana Joya.

16. That on October 14, 2003, the Respondent, for discriminatory reasons, discharged Sandra Hernandez and Ana Joya.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted and I find that Service Employees International Union, Local 32BJ, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

North Hills Office Services is a cleaning contractor that does business in the New York/New Jersey Metropolitan area. In the present case, it has a contract to provide such services for a company called Linque Management at an office building located at 990 Stewart Avenue in Garden City, New York.[1]

North Hills employs about 400 cleaning employees who work at about 60 to 65 locations. Since 1974, with one exception, its employees, on a companywide basis, in the classifications of matrons and porters, have been represented by another labor organization called the National Organization of Industrial Trade Unions (NOITU).

The Stewart Avenue location is a six-story office building occupied by various commercial and governmental tenants.

The Respondent, Local 32BJ and NOITU have not been strangers to one another or indeed, to the National Labor Relations Board (the Board).

In a decision at 342 NLRB 217 (2004), the Board found that the North Hills violated Section 8(a)(1), (2), and (5) and that NOITU violated Section 8(b)(1)(A) and (2) of the Act. In that case, the Company, in the summer of 2002, had taken over the operations of a company called Harvard Maintenance Inc. at an office complex in Rutherford, New Jersey. In doing so it hired a majority of Harvard's employees who had been represented by Local 32BJ. Instead of recognizing and bargaining with Local 32BJ, whose contract provided for higher rates of pay than the contract with NOITU, North Hills assisted NOITU in obtaining employees to sign union authorization cards and illegally recognized NOITU as the bargaining representative. Concluding that NOITU did not represent an uncoerced majority of these employees, the Board also held that NOITU had violated the Act by accepting recognition and by executing a collective-bargaining agreement covering these employees. In that case, the cast a characters was much the same as in the present case.[2]

In another case, JD(NY)–38–04, Judge Edelman dealt with a situation where Local 32BJ was attempting to organize Respondent's employees at another location during the spring and summer of 2003. As in the present case, the employees were covered by a contract with NOITU. In that case, the judge concluded that the Respondent violated the Act by **(**a) discharging and suspending two employees because they supported Local 32BJ; (b) demanding that employees show green cards and/or social security cards in order to discourage membership in Local 32BJ; (c) impliedly threatening employees with discharge; (d) illegally interrogating employees about their union activities; (e) engaging in surveillance of employee union activities, and/or creating the impression that it was engaged in surveillance; (f) directing employees not to talk to union representatives; and (g) telling employees that selecting the union would be futile. In that case, Judge Edelman discredited the Respondent's witnesses including Pellegrino and Matos who also testified in the present case. Also at pages 18 and 19, he concluded that the Respondent violated the Act by creating the impression of surveillance via the issuance of a July 1, 2003 issue of "Plain Talk" which was also issued to the employees in the present case.

At 990 Stewart Avenue, there were 2 employees who were assigned to work the day shift and about 13 who worked during the night. Since much of the cleaning was done in the tenant's spaces, most of the Respondent's employees began their shifts after 6 p.m. The evidence shows that the day-shift employees of the Respondent were actually supervised by Robert Kinsley who was the property manager for Linque. The two employees of the Respondent who worked on the day shift were Esmerelda Leon and Julio Jimenez and also worked the night shift. The remaining employees worked at night under the direct supervision of Alfonso Riano.

The hierarchy of the Respondent is as follows. Paul Kaplan is the president. Tom Pellegrino is the vice president of operations. Mindy Levy is the controller and she is involved with various accounting and human resource functions, including making sure that the Company is complying with the wage rates and other terms of the contract with NOITU. Eddie Matos is the operations manager and he is in charge of the day-to-day operations of the Company at all of the locations where it is working. Alfonso Riano is the night-shift supervisor of the employees located at 990 Stewart Avenue. (He may also have some contact with the two day-shift employees and can tell them what to do.)

[1] Originally, the complaint alleged that Linque and North Hills were joint employers. However, as Linque entered into a separate settlement agreement the allegations against it was dropped.

[2] I note that Judge Kern did credit the testimony of Pellegrino to the extent that he denied the allegation that he had threatened employees with discharge.

Local 32BJ began an organizing campaign amongst the employees of the Respondent in or about the spring of 2003. As the target bargaining unit was all of the Company's employees, Local 32BJ engaged in organizing activity at 990 Stewart Avenue and other locations.

A. Late June and July 2003

In late June 2003, Local 32BJ organizer Ericka Bozzi started to approach employees who worked at 990 Stewart Avenue. Initially, she spoke to these workers in the parking lot of the building or in a café that was nearby. In this respect, she was successful in getting six of the employees to support the Union, these being Marcia Reyes, Ana Joya, Maria Mendoza, Sandra Hernandez, Julio Jimenez, and Esmerelda Leon.

The evidence shows that the Respondent was aware that Local 32BJ was organizing at least by June 25 as it published a newsletter called "Plain Talk" on that date which stated:

> All of us know that Local 32BJ has declared war on NOITU and the Company. We do not know why, except that your dues must be the incentive and represents a lot of m money to the unions.
> *Be on Guard against Local 32BJ's dirty tricks*.

On Sunday, June 29, 2003, Bozzi held a meeting at a church that was attended by five of the six employees named above. (Jimenez was not there). The employees signed union authorization cards and were given other cards to pass out to their coworkers during off hours. This they did on Monday, June 30, 2003. Also, at the meeting, the employees signed a petition indicating their support for Local 32B and they were asked to hand this to the Employer. In this regard, it appears that Julio Jimenez attempted to do this on July 1 or 2, 2003, but that Riano refused to accept the paper and it was left on a desk in the office.

Esmerelda Leon testified that at about 9 p.m. on June 30, 2003, after the shift had ended, Eddie Matos visited the building with Alan Jimenez, a NOITU representative, and held a meeting with some of the employees. She testified that Matos asked who had attended the Local 32BJ meeting and also asked if anyone had been affiliated with Local 32B in the past. Leon testified that she said that she had previously been a member of Local 32B when she worked at Bloomingdale's whereupon Matos asked her what the benefits were. She testified that she described some of the benefits and that the meeting ended. Matos, for his part, denied these contentions and stated that he did not become aware of the union meeting at the church until several days later.[3] Matos testified that he did meet with the cleaning employees at around 6 p.m. on June 30 because Riano had told him that some of the employees were not following his orders. Matos testified that he went to the building to remind the employees that they had to respect Riano and that they could not talk back to him. He states that he told the employees that if they had any problems with Riano' instructions to them, they should contact him (Matos).

On July 1, 2003, the Respondent, by Supervisor Riano issued written warnings to Sandra Hernandez, Ana Joya, and Maria Mendoza. These warnings stated:

> This warning is for interrupting the cleaners on company time and not permitting them to do their work on June 30, 2003.

With respect to these warnings, the evidence shows that (a) the Company does not have any rule prohibiting solicitations or distributions during working time or on company property and (b) the actual solicitations took place while employees were not actually engaged in work. Therefore, there was no actual interruption in work. For example in the cases of Sandra Hernandez and Ana Joya, they credibly testified that they either asked other employees to sign union cards or handed out a union leaflet while they were waiting for Riano to open the closet near the end of the shift so that they could put their cleaning tools away. Thus, although the evening shift runs from 6 to 9 p.m., these employees had actually completed their work when the solicitation occurred. As to Maria Mendoza, Riano at first asserted that he saw her hand something to another employee on the third floor. But he then testified that he never actually saw Maria give anything to anyone that night.

On July 1, 2003, the Respondent published and distributed another issue of Plain Talk that read:

> Local 32BJ had a meeting on Sunday, June 29th in a house of worship. They desecrated it by using it to spread lies about their rate of pay. Attached is a paycheck from a national company doing business on Long Island competing with us and having a contract with 32BJ and paying its employees $6.50 per h our and the union dues is $26.00 In other words, you will pay Local 32BJ $2.30 for every hour that you work.
>
> Local 32BJ has been forging documents. Please be careful when you give them a copy of your signature, especially when they are using it for unlawful purposes. [4]

On July 1, 2003, the six employees who signed cards for Local 32B arrived at work wearing union T-shirts. On the front in large letters, the shirt states, "SEIU Justice for Janitors." It also has a picture of a raised fist holding a broom. On the back it reads, "Standing Up for the American Dream." The shirt also has the Union's name written on the sleeve. There is really no dispute that on July 1, 2003, Alfonso Riano, with agreement of his boss, told these employees to take off the union t-shirts. In this regard, Julio Jimenez testified that when he asked Riano why he had to take off the T-shirt, he was told that it was not permitted to use propaganda on private property. Ana Joya testified that Riano told her that she had to take off the Local 32B T-shirt or she would be fired. Sandra Hernandez testified that Riano told her that if she didn't take off the Local 32B T-

[3] But note that on July 1, 2003, the Company issued a bulletin to its employees, which referred to the union meeting at the church that was held on June 29.

[4] In Judge Edelman's decision at JD(NY)–38–04, he concluded that the Respondent by issuing this document, violated Sec. 8(a)(1) by creating the impression that its employees union activities were under surveillance.

shirt, "we are going to have to give you a warning." Riano denies that he made such a threat and Jimenez did not testify as to any threat of discharge made to him.

Notwithstanding the instruction by Riano, these six employees arrived at work on the following day (July 2), wearing the T-shirts. On this occasion, instead of telling the employees to remove the shirts, Riano distributed aprons with North Hills' logos on them and told them to wear them over their clothes. This would have had the effect of covering the front and back of the union T-shirts but not the union logo on the sleeve. In any event, after the distributing the company uniforms, which these night-shift employees at this location had never worn before, the employees gave up on wearing the union T-shirts at work. (The two day-shift employees, Julio Jimenez and Esmerelda Leon, had previously been required to wear company uniforms during the day shift and obviously it was far more likely that the day-shift workers were going to encounter tenants than the night-shift workers who mostly worked after the tenants left the building.)

There is no dispute that in early July 2003, the employees of 990 Stewart Avenue received raises. (I'm not sure if employees working at other locations also got raises.) Pellegrino testified that the wage increases came about after NOITU requested in June 2003 (for some reason unknown to him), that all bargaining unit employees be brought up to $6.50 per hour. Mindy Levy, the Company's controller testified, however, that NOITU did not initiate the wage increases; that they were initiated by the Company.

At the time of these wage increases, the contract between NOITU and the Respondent was not due to expire for about 5 more months (until the end of November 2003), and there is no evidence that those two parties had commenced negotiations for a new agreement. In any event, it is obvious that by the time that these raises were contemplated and given, both NOITU and the Respondent were aware that Local 32BJ had just commenced an attempt to organize the porters and cleaning employees. It therefore is probable that each entity thought that one way to blunt this organizing effort was to grant wage increases during the midterm of their collective-bargaining agreement and not wait for a new agreement to be negotiated.

On or about July 8, 2003, NOITU's representative, Alan Jimenez met with the night-shift employees before the shift began. Ana Joya testified that after the meeting, Riano came over to her and asked her to sign a piece of paper. Similarly, Esmerelda Leon and Sandra Hernandez stated that they were also approached by Riano to sign what appeared to them to be a blank piece of paper. With respect to this document, Julio Jimenez claimed that he signed the document but that it was in English and he was not told what it was for. Similarly, Maria Hernandez stated that she was asked to sign the document by Riano but that she signed a document without reading it.

Although the General Counsel contends that this document was a petition withdrawing membership in Local 32BJ, none of the employee could actually recognize the offered document (GC Exh. 7), as the one they signed, either because it was folded, or because they couldn't or didn't read it. Thus, although General Counsel's Exhibit 7 has the names of these employees on it, the testimony regarding the document is, to my mind too ambiguous to base a finding that the Respondent violated the Act in this respect.

In or about July 2003, Leon and Jimenez, both of whom worked during the day, were told that they no longer could eat their lunches together; that they had to break up their lunches so that one would be available if needed. At another time, they were told that since their hours of work were from 9 a.m. to 4 p.m., they were required to stay until their shifts ended and then go home.

As to leaving early, the Employer asserts that it merely was insisting that these two employees stay on the job for the time that they were being paid for. In this respect, the evidence was that the employees were hired to work the evening shift that ran from 6 to 9 p.m. and which normally ended at around 8:50 p.m. when the employees were expected to put away their tools. I don't think that the Employer's insistence that its employees work the full time that they were being paid, constitutes a violation of the Act.

The Respondent argues that the lunchbreak change, which did not alter the amount of breaktime either employee had, was caused by the need to have an employee always available in the event that a tenant needed to have something done. Although Riano conceded that Leon and Jimenez had eaten together for quite a while. He testified that he decided to change this after a tenant complained about an overflowing toilet. However, Riano acknowledged that in the past, when he needed a porter, he was able to have one of the two employees stop eating and do the required task. Thus, there seems to be no real connection between Riano's need to have an employee available for emergencies and his requirement that they eat at separate times.

B. August 2003

Moving on to August 2003, the General Counsel asserts that the Respondent violated the Act when it required Jimenez to mop the stairs every day. This, it is contended, was an example of requiring an employee to perform a more onerous duty in retaliation for his union activity.[5]

Jimenez' job during the day time was to clean the bathrooms, the parking lot, and the lobby areas. At night, he cleaned the cafeteria and the basement. Part of the Respondent's contractual responsibilities was to mop the two stairways. And in this respect, Jimenez testified that before August when he was told that he had to mop the stairs everyday, he sometimes mopped the stairs as "a favor" to Alfonso Riano.

The fact is that mopping the stairs every day is not different from Jimenez' normal duties (cleaning), and can hardly be described as more onerous. What it requires is simply to take a pail of water with a mop into the elevator, take the elevator to a floor, take the pail to the stairwell, put the mop into the pail and proceed to mop the stairs from floor A to floor B. Then one takes the pail back to the elevator and goes to the next floor. I shall recommend that this allegation be dismissed.

[5] I note that another of the General Counsel's witnesses, Sandra Hernandez testified that at a meeting in the parking lot held on June 27, 2004, Jimenez complained about being required to mop the floors everyday.

The Company asserts that Riano issued two warnings to Ana Joya, one on August 8, 2003, and the other on August 29, 2003. These allegedly were for insubordination and neither was alleged in the complaint or any amended complaints to be a violation of the Act.

Jimenez testified that at the August meeting where he was assigned to mop the stairways every day, Riano told the employees that he didn't want to see them talking among themselves during working hours. Sandra Hernandez testified that Riano told the employees that he didn't want anyone talking in the hallways. Esmerelda Leon testified that Riano said that the employees could not talk inside the building and that they had to be separated while they worked. This was denied by Riano who testified that there was no rule prohibiting the employees from talking while at work. And indeed, the Respondent's written rules do not contain any such prohibition. The Company rules do, however, prohibit "employee gatherings" during working time.

On balance, and in light of the mutual corroboration of the employee witnesses, I am going to credit their account and conclude that in August 2003, Riano told them that they no longer could talk to each other during working hours. While not necessarily a rule of the Company (more like Riano's rule for this particular building), this local prohibition on solicitation was, in my opinion, overly broad and therefore a violation of Section 8(a)(1) of the Act.

The Union engaged in some leafleting activity outside the building in August 2003. But for the sake of clarity and because there was another incident involving leafleting in October 2003, I shall discuss this under a separate heading.

C. September 2003

On September 22, 2003, the Respondent issued a newsletter to its employees that stated:

> Many of you must have read the newspapers regarding the bigotry and the bias crimes committed against Hispanic workers in Farmingville. 32BJ has shown their true colors when they went to the Federal Labor Board with a group of employees and told the Federal Labor Board that at North Hills many of the hardworking Hispanic people we employ are undocumented. 32BJ is creating problems for hardworking Hispanic people! 32BJ is trying to get the INS to threaten North Hills employees. You have to ask yourself why did the Union engage in such gutter tactics. When you see a 32BJ representative or a sympathizer, ask them why they told the Labor Board that the people working at North Hills are undocumented. To verify that they told this to the Labor Board, you need only to call the attorney at the Board, Amy Gladstone. . . . This is the most unprincipled tactic that any union can use and only a union as unscrupulous as 32BJ would engage in this kind of activity.

On or about September 29, 2003, the Union held a rally in front of the building at which Esmerelda Leon spoke through an amplification system.[6] It seems that during this rally, Leon had some unkind things to say about Riano.

According to Leon, after reporting to work, Riano asked her why she said those things about him and called her a bitch. Leon states that when he pressed her about what she said about him, she told him that she was telling the truth and that he treated her like a bitch. Leon testified that at one point during this argument, she told him that he should not argue with her and that "he should get a man like him." Leon further testified that later in the evening, Riano told her that she no longer could pick up the cans and that if she continued to do so, he would give her a note.

Riano testified that there was a demonstration outside the building in September and that he heard Leon accuse him of treating the employees like animals and that he did not respect them. He testified that he approached Leon and told her that she should be careful about what she said because he never disrespected the employees and never treated anyone badly. According to Riano she shouted at him and said that he should look for a man to which he responded that she was a bitch. As he understood it, Leon was calling him a "maricone," which is for Spanish speaking people, a stronger epitaph than being called a "faggot" in English.

As far as picking up cans, Riano testified that he told Leon that she should not do this because it was taking up too much time from her normal duties. (I assume that everyone is talking about Leon's practice of taking the cans for herself so that she could pocket the five-cent deposits.) Leon further testified that she nevertheless ignored his instruction and continued to remove and take cans from the garbage. As to this allegation, I am going to recommend that it be dismissed. Whether or not Riano was motivated by Leon's union activity, it is my opinion that the Company can insist that its employees work for the Company and not for themselves while on the clock. And to the extent that Leon managed to make a few extra bucks by retrieving soda bottles and cans, the amounts would be trivial. (It takes 100 cans to equal $5.)

D. Leafleting

In August 2003, the Union along with employees Sandra Hernandez and Maria Mendoza handed out leaflets in front of the building near the entrance.[7] They engaged in this activity from about 12 noon to 1 p.m., this being a time that they were not required to be at work. The Union's witnesses testified that Riano came out and told them that they were not allowed to distribute fliers at this location because it was private property. On the same evening between 5 and 6 p.m., these employees again distributed leaflets and were again told by Riano that they could not do so because they were on private property.

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[6] The parties agree that this event took place on September 29, 2003, although Esmerelda Leon remembered it as taking place on July 29, 2003.

[7] The leaflets asserted that the employer required Sandra Hernandez to clean the bathrooms and that the chemicals it used irritated her throat.

On October 14, 2003, employees Hernandez, Joya, and Mendoza handed out leaflets while wearing their union T-shirts. The testimony was that at about 5:30 p.m., Riano came out and told the employees that they could not hand out the leaflets because they were on private property. When the employees refused, Kingsley, Linque's agent called the Nassau County police who told him that the employees were within their rights to leaflet at the property. At 6 p.m. the employees stopped leafleting and went to work.

Insofar as the leafleting, Riano testified that on one occasion he told the employees that a tenant had complained that they were interrupting the exit from the building. He states that he told Jimenez, "Julio, please, can you distribute those leaflets outside the parking lot, outside of the property of the building?" Riano testified that when Jimenez refused he returned inside, told the security officer what was happening, and that the security officer went out to speak to them.

The evidence shows that neither the Respondent nor Linque have any proprietary interest in the facility. They are contractors who manage the building and clean it. There was no evidence that the actual owners of the building sought to prevent protect any property interest and there was no evidence that the employees who were engaged in the leafleting activity interfered with the ingress or egress of tenants or their guests. Whether some tenants may have complained about the leafleting is not relevant. This is, after all a country where individuals sometimes are inconvenienced by others who want to get their message out.

E. The Discharges of Ana Joya and Sandra Hernandez

Until sometime in August 2003, Sandra Hernandez was the person on the night shift who was primarily responsible for cleaning the bathrooms. She complained that the chemicals irritated her throat and the Union distributed leaflets complaining about this. Accordingly, in mid-August, Riano decided to rotate the woman to clean the bathrooms. But at some point, he decided to assign Ana Joya to this job. According to Joya, she complained to Riano about this and he promised that when he hired another person, he would have her clean offices again. According to Joya, there were two new employees hired but Riano refused to change her assignment. She testified that he said, "I'm not doing any changes at this time." Based on this evidence, I do not think that the General Counsel has proved that the Respondent refused to reassign Joya because of her union activity and I shall recommend that this allegation be dismissed.

On Friday, October 10, 2003, an incident occurred between Riano and Marcia Reyes. Although the General Counsel contends that this incident had nothing to do with Ana Joya and Sandra Hernandez, it clearly did as it set the stage for what later happened between him and these two workers. To the extent that the legality of the discharges of Joya and Hernandez depend on the intent of the persons who decided to discharge them, the Respondent argues that the events involving Marcia Reyes, certainly affected the state of mind of Riano.

That Friday, Riano got into an argument with Marcia Reyes about picking up paper from the offices. She told him and his assistant, Graciella Pena, that she wasn't going to do it and "you can do what you like." She also told Riano that he was a "nobody" and that he couldn't tell her what to do. At one point, according to Riano, Reyes called him a "maricone."[8] At around the end of the shift, Riano attempted to hand a warning to her but she refused to take it. He did, however, manage to have his superior, Tom Pellegrino, come down to the building and give her a warning on Monday, October 13, 2003. This warning was for insubordination and essentially charged Reyes with refusing to follow orders and for shouting at her supervisors. At that time, Reyes was also told that it would be best if she transferred to a different building. She refused.

While Pellegrino was at the building on October 13 to give the warning to Reyes, Joya approached him and demanded to be paid more money for cleaning the bathrooms. Pellegrino responded that he would have to talk to his superiors and get back to her.

On Tuesday, October 14, 2003, Hernandez, Joya, and Mendoza handed out leaflets while wearing their union T-shirts. Their testimony was that at about 5:30 p.m., Riano told them that they could not hand out the leaflets because they were on private property. The evidence also was that Linque's agent, Kingsley, called the Nassau County police who said that the employees were within their rights to leaflet at the property. At 6 p.m. the employees went to work.

When Ana Joya arrived at work, she asked Riano if he had an answer for her about the raise. Riano responded that she should call the office. As this was taking place in the basement, Sandra Hernandez, Esmerelda Leon, and perhaps other employees were standing nearby.[9] There was a lot of testimony about this event by these people and there was, predictably, two alternative versions as to who was yelling at whom and what type of curses, if any, were made.

According to Ana Joya, she asked if Riano had an answer about the raise and he said that she should call the office. Joya states that he said that if she needed the telephone number, she could get it from the same people who gave her the flyers. She states that Riano said that he was going to fire her if she didn't go back to work and that she replied, "[Y]ou're not going to get rid of me that easy" and that he didn't have to treat workers in that fashion. She claimed, but no other person confirmed, that Riano threw a pair of gloves at her when he said, "Shut up and go to work." She denies cursing or yelling at Riano.

Esmerelda Leon testified that he heard Ana Joya ask Riano for a change from the bathrooms. She states that Riano told Joya that she should call the company and that if she didn't like it the doors are open and she can go. Leon testified that she didn't hear anything else and that did not hear either person yelling, although Riano's tone of voice was a "little bit

[8] I should note that at various points in the transcript this word is misspelled.

[9] Sandra Hernandez testified that Jimenez and another employee named Antonio was also present during this transaction. Jimenez, who testified at great length about various other things, was not asked by the General Counsel or the Respondent to give his account of what happened on October 14 in the locker room. Antonio was not called as a witness.

stronger, higher voice." According to Leon, she did not hear anyone use any curse words toward Riano during this transaction.

Sandra Hernandez testified she heard Joya ask Riano if he had an answer for her and he said, "[Y]ou are good at handing out papers, go get the answer someplace else." She testified that during the conversation between Joya and Riano she intervened and told him that he should stop yelling at Joya. Hernandez states that Riano responded that she should keep her comments to herself and go back to work. According to Hernandez, Joya was not yelling at Riana and that Riano started to scream at Joya before he told her to go clean the bathrooms.

Riano's version is quite different. He testified that after he told Joya that he did not have an answer about her requested raise, Joya started to yell and curse at him in front of other employees. He testified that she used words, which the translator characterized as calling him and the company as "idiots" or "fools." He testified that when Sandra Hernandez intervened, the other workers started to laugh at him and they collectively started saying things like, "are you a man or a chicken?"

According to Riano he said to himself, "everything is lost," meaning I suppose that he felt that he had lost any semblance of control over the employees. He asserts that he therefore placed calls to Tom Pellegrino and Eddie Matos and told them that he couldn't take the employees cursing at him anymore. He states that he told Matos that the situation was out of control and that he needed help.

Pellegrino and Matos then went to the building and Riano allegedly told them that the workers were cursing at him and that he was losing control. By this time, Riano had written up warnings for Hernandez, Joya, and Reyes. And after determining that they had received previous warnings,[10] Pellegrino and Matos testified that they decided to discharge all three. Pellegrino then spoke to each of the employees and told them that they were being discharged because of insubordination.[11]

I note that Marcia Reyes was one of the three employees discharged on October 14, 2003, and that she was among the group of six employees who were actively engaged in Local 32BJ's organizing efforts. Nevertheless, despite a charge having been filed on her behalf alleging that her discharge was unlawful, the complaint does not allege that either the August warnings or her termination on October 14, 2003, was unlawful.

[10] The evidence shows that Joya received prior warnings on August 8 and 29. It is not alleged by the General Counsel that these warnings were violative of the Act. In the case of Sandra Hernandez, she had previously been terminated by the Company for excessive absences and had been rehired, through the efforts of NOITU, before Local 32BJ started its organizing effort.

[11] Although the Company has a progressive disciplinary system that normally requires three warnings before a discharge, this is not written in stone and an employee may be discharged for a serious offense without any prior warnings.

II. ANALYSIS

Insofar as this Company is concerned, there has been an ongoing contest between one union (NOITU), and another union, Local 32BJ, which has been seeking to organize the employees for several years. (As noted above, NOITU has a company-wide contract with the Respondent.) This contest was manifested as early as the summer of 2002, after the Respondent took over the operations of Harvard Maintenance Inc., at an office complex in New Jersey and attempted to compel the employees there to forego their representation by Local 32BJ and compel them to join NOITU. That situation resulted in a Board Order at 342 NLRB 208, which concluded that the Respondent and NOITU violated various provisions of the National Labor Relations Act.

The organizing activity involved in the present case commenced in the spring of 2003 and was not limited to the employees located at 990 Stewart Avenue. Judge Edelman concluded in another case, that Local 32BJ also attempted to organize employees at a location in Melville, New York. He also concluded that those efforts were met by a serious of unfair labor practices that commenced in May 2003 and included the unlawful discharges and suspensions of employees, threats of discharge and surveillance of employees' union activities.

Thus, when Local 32BJ organizers started to communicate with employees at 990 Stewart Avenue, the Respondent was already aware that organizing had already begun with respect to at least one other location. Therefore, by May 2003, the Respondent was aware generally that Local 32BJ had begun an effort to organize its employees. It also was aware with respect to the present location, that the Respondent knew of Local 32BJ's organizing efforts by at least one day before June 25, 2003. This is shown by its issuance of a newsletter called "Plain Talk" on June 25, 2003. (I will assume that it would likely take at least 1 day to write, print, and distribute such a newsletter to employees.) And the newsletter makes it plain that the Respondent was not happy with Local 32BJ's organizing efforts. It stated:

> All of us know that Local 32BJ has declared war on NOITU and the Company. We do not know why, except that your dues must be the incentive and represents a lot of m money to the unions.
> *Be on Guard against Local 32BJ's dirty tricks.*

The Union held a meeting at a church on Sunday, June 29, 2003, where some employees signed cards and were given cards to distribute to other employees at the workplace. They also signed a petition supporting Local 32BJ that was at least left on the supervisor's desk on the following day.

The evidence shows that on Monday evening, June 30, 2003, the Operations Manager Eddie Matos visited 990 Stewart Avenue and held a meeting with some of the employees in the presence of Alan Jimenez, a representative of NOITU. The credible evidence is that Matos asked who had attended the church meeting with Local 32BJ and which employees had been affiliated with that union in the past. I do not credit Matos' testimony that he was not aware of the church meeting until several days later. (The Respondent, on July 1, 2003, put out an issue of Plain Talk that mentioned the meeting at the church on June

29.) I also conclude that in this respect, the Respondent interrogated employees in violation of Section 8(a)(1) of the Act.

Also on June 30, 2003, Sandra Hernandez, Ana Joya, and Maria Mendoza talked to other employees during the night shift and gave them either union cards or some other type of union literature.

On July 1, 2003, the Respondent issued warnings to these three employees and each warning stated:

> This warning is for interrupting the cleaners on company time and not permitting them to do their work on June 30, 2003.

The Respondent claims that these warnings were justified under Board law as it asserts that a company may legitimately make rules prohibiting employees from engaging in solicitations or distributions of literature in working areas during working time. Citing *Stoddard-Quirk Mfg. Co*., 138 NLRB 615, 616 (1962), and *Farah Mfg. Co*., 187 NLRB 601 (1970).

The problem with the Respondent's argument is that it did *not* have a rule that prohibited either solicitations or distributions. Therefore, employees who otherwise were engaged in union activity were not on notice that such activity was prohibited by their employer and could not reasonably have believed that such union activity might result in disciplinary action against them. In the absence of a valid rule, it is my opinion, that the Respondent violated the Act by issuing warnings to employees who were engaged in this union activity. In this regard, the evidence shows that these solicitations and/or distributions were extremely short in duration and were not, in fact, disruptive to their own work or to the work of other employees. I note that even when an employer promulgates a presumptively valid no-solicitation and no-distribution rule, its promulgation and enforcement will be unlawful if the reason for its promulgation is in response to a union's organizing activity. *Jensen Enterprises*, 339 NLRB 877 (2003).

By the same token, I conclude that the Respondent violated the Act in August 2003, when Riano told employees that they could no longer talk to each other while at work. Although the evidence does not show that the Respondent promulgated a new company wide rule, the evidence does show that at this location at least, supervisor Riano instructed employees not to talk while at work, and this therefore became the local rule. In my opinion this instruction was overly broad and I concluded that Riano' statements constituted a violation of Section 8(a)(1) of the Act. Thus, rules that prohibit solicitations on company time are presumptively unlawful as they can "reasonably be construed as encompassing both working and nonworking time." *Litton Systems*, 300 NLRB 324 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992); *Industrial Wire Products*, 317 NLRB 190 (1995), and *Eastex Inc*., 215 NLRB 271, 274 (1974), enfd 550 F.2d 198 (5th Cir. 1977), affd. 437 U.S. 556 (1978). Prohibitions restricting solicitation during working hours are facially unlawful because they imply a prohibition from the beginning to the end of the shift. *Our Way*, 268 NLRB 394 (1983).

On July 1, 2003, the six night-shift employees who wore union T-shirts to work, were told by Riano to remove them. Ana Joya was told that if she didn't remove the T-shirt she would be fired. Sandra Hernandez was told that she would receive a warning if she didn't remove the T-shirt. On the following day, when employees again arrived at work with the T-shirts, they were given company aprons and told that they had to wear them. These aprons covered up the Local 32BJ T-shirt except for the sleeves.

Although the evidence shows that the day-shift employees were required to wear a company uniform, the evidence also shows that the night-shift employees at this building were not required to do so until July 2, 2003.

The union T-shirts contained the Local 32BJ logo on the sleeve. On the front it states, "SEIU Justice for Janitors" along with a raised fist holding a broom. On the back of the shirt, it states, "Standing Up For the American Dream."

The Respondent contends that it was within its rights in telling the employees to remove the T-shirts and in requiring then to wear the uniform, which effectively covered up almost all of the union T-shirt. I do not agree.

Absent "special circumstances" an employer cannot prohibit its employees from wearing union insignia, buttons, or T-shirts while at work. *Republic Aviation Corp., v. NLRB*, 324 U.S. 7933, 801–803 (1945); *Wellstream Corp*., 313 NLRB 698 (1994); *Caterpillar Inc*., 321 NLRB 1178, 1180 (1996).

The Respondent might argue that the use of uniforms was necessary in order to allow the tenants of the building to identify them as being rightfully on the premises. But although this would be more appropriate for the daytime employees, it clearly was not the case for the night-shift employees, who for the most part, began their work after most of the tenants went home. Moreover, the credible evidence shows that at least at this building, the Respondent's night-shift employees had not previously been required to wear company uniforms.

The Respondent cites *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994), for the proposition that "special circumstances" can be demonstrated to justify a prohibition on union insignia where its display would interfere with the public image of the employer. See also *Nordstrom Inc*., 264 NLRB 698, 700 (1982); *Evergreen Nursing Home*, 198 NLRB 775, 778–779 (1972). In *United Parcel Service*, supra, the Board held that a small unobtrusive pin, free of a provocative message, did not unreasonably interfere with the employer's public image. On the other hand, the Board in *United Parcel Service*, 195 NLRB 441, 450 (1972), refused to find a violation when the employer banned a much larger pin. Other cases cited by the employer are *Produce Warehouse of Coram, Inc*., 329 NLRB 915, 918 (1999); *Sears Roebuck & Co*., 300 NLRB 804, 806 (1990). In *Noah's New York Bagels*, 324 NLRB 266, 275 (1997), the Board held that although the employer could not ban its employees from wearing union T-shirts, it could ban T-shirts that mocked the employer's kosher policy. In *Pathmark Stores, Inc*., 342 NLRB 378 (2004), the Board upheld the employer's ban on employees wearing shirts that said, "Don't cheat about the meat."

I reject the Respondent's argument that the statements on 32BJ's shirts were provocative. The shirts portray a fist holding a broom and a slogan, "Justice for Janitors." In my opinion, the shirts did not disparage the Employer's product, were to be worn when the vast majority of the tenants were not present,

and were not remotely comparable to those in *Pathmark* or *Noah's Bagels*.

Accordingly, I conclude that by prohibiting the employees from wearing union T-shirts while at work, and by requiring them to wear company uniforms that largely obscured the message on the Union's T-shirt, the Respondent has violated Section 8(a)(1) of the Act.

The evidence in this case shows that on July 1, 2003, the employees at 990 Stewart Avenue, received pay increases. This occurred 3 days after the Union's meeting with the employees at the church. This also occurred during the middle of the collective-bargaining agreement between the Respondent and NOITU and that contract contained provisions for wage increases made when the agreement was executed. That contract was not set to expire until the end of November 2003 and from what I can see, negotiations for a new agreement had not yet started.

The Respondent presented two witnesses to testify about this subject and each gave contradictory versions. Pellegrino testified that at some unspecified date in June 2003, NOITU, for some unexplained reason, asked the Company to bring the minimum contract wage up to $6.50 per hour and the Company agreed. The other witness, Mindy Levy testified that the idea of raising the minimum wage rate was the Company's and that it was not initiated by NOITU. The Respondent offered no real evidence as to when this decision was made, except that it asserts in its brief that it must have been made at least 1 week before July 1, 2003, because that is the amount of time it would have taken for the outside payroll company to make the changes effective on July 1. (In its brief, counsel suggests the date as being June 24, 2003, which would be 1 day before its Plain Talk publication dated June 25, 2003.)

In any event, it is clear that the Company was aware of Local 32BJ's organizing activity by May 2003, if not specifically at 990 Stewart Avenue, then at least at its nearby facility in Melville, New York. That is, the Company was aware by mid-May 2003 that Local 32BJ was intending to organize the employees in the Company's existing collective-bargaining unit with NOITU. Moreover, the Company's decision to raise wages at 990 Stewart Avenue could easily have been made, contrary to its assertion, at any time between June 24 and 30. I don't know that it impossible to implement a wage increase within a shorter time than counsel asserts.

Benefits granted upon the advent of a union organizing campaign (assuming the Employer is aware of it), creates a presumption that they are granted to influence employees to withhold their support for unionization. *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1344 (2000); *B & D Plastics*, 302 NLRB 245 (1991); *Speco Corp*., 298 NLRB 439, 443 (1990). To rebut this presumption, the Employer must establish a legitimate explanation for the timing of the grant of benefits.

The General Counsel cites *Carter's Inc*., 339 NLRB 1089 (2003), for the proposition that an employer failed to rebut the presumption merely by asserting that there was high employee turnover and that higher wages were being given by its competitors. In finding the violation, the Board relied on the lack of evidence showing that the Employer planned or contemplated the wage increase before the onset of union activity.

The Respondent cites *In re Morse Operations,* 336 NLRB 1090 (2001), presumably for the proposition that for pay increases to violate the Act, the General Counsel has to prove that the Respondent was aware of the Local 32BJ's organizing activity.

Since the wage rates of these employees, as of July 1, 2003, were contractually set and as I conclude that the decision to raise those rates was made *after* the Respondent became aware of Local 32BJ's organizing activities and before any new contract negotiations started with NOITU, I find that the Respondent granted this benefit in order to dissuade its employees from becoming members of Local 32BJ and to induce them to stay members of NOITU.[12]

With respect to the September 22, 2003 newsletter referring to the INS, this same newsletter was previously found to violate the Act by Judge Edelman who cited *6 West Limited Corp*., 330 NLRB 527, 545 (2000). The Respondent asserts that this type of communication is protected by Section 8(c) of the Act. Nevertheless, I see no compelling reason to disagree with Judge Edelman's finding on this score, particularly as I have concluded that the statements in the newsletter should be taken in the context with the other numerous violations found in the present case.

The evidence shows that there were two instances where the Union and some of the employees engaged in leafleting outside of 990 Stewart Avenue. This leafleting was carried out in the parking lot and probably was done at variant distances from the doors of the building. In any event, the evidence does not show that the employees, no matter how close they came to the doors, blocked the ingress or egress of any persons entering or leaving the premises. Nor is there any evidence to show that this leafleting activity was carried out in anything other than a safe, inoffensive and peaceable manner. Finally, the evidence does not show that the Respondent had any proprietary interest in the property or in the parking lot adjacent to it.

On both occasions, Riano told employees who were engaged in this leafleting activity that they could not do so because they were on private property. On the second occasion in October 2003, the building manager's agent, Kingsley, called the police but the police told him that the employees were within their rights.

Riano's statements border between a company directive and an assertion of opinion. But Riano was the Respondent's representative when dealing with its employees at 990 Stewart Avenue and his statements that leafleting activity was improper because such activity constituted trespass (and therefore arguably illegal), may reasonably be viewed by the employees as a

[12] A different conclusion would have been reached if NOITU and the Respondent had commenced contract negotiations to replace the collective-bargaining agreement that was set to expire in November 2003. Thus, in *RCA del Caribe,* 262 NLRB 963 (1982), the Board held that even where a rival union filed a petition for an election, the employer was obligated to continue to bargain with the incumbent union and to execute a contract if an agreement is reached. (Of course such a contract would become null and void if the rival union won the election and was certified as the exclusive collective-bargaining representative.)

directive, carrying with it an implied threat of disciplinary action. As such, I conclude that these statements constitute violations of Section 8(a)(1) of the Act. *International Business Machines Corp.*, 333 NLRB 215, 219–221 (2001).

In my opinion, the discharges of Ana Joya and Sandra Hernandez present a difficult issue. To my mind the evidence shows two possible scenarios concerning their discharges on Tuesday, October 14, 2003.

Obviously, the first question here is what was the Employer's motivation or intent in discharging these two employees. And in this regard, it is not necessary for the General Counsel to present direct evidence of discriminatory intent (such as a smoking gun in the form of an employer memorandum or e-mail), or a confession by one of the owners or managers. It is enough that the General Counsel prove, through circumstantial evidence and by a preponderance of the evidence (not beyond a reasonable doubt or by a clear and convincing standard), that the Employer's agent or agents was motivated in this action by a belief that his employees were engaged in activities in support of a union or that they were engaged in protected concerted activities.

The next question is, assuming that the discharges or other disciplinary actions were motivated by employee union or protected concerted activities, would the Employer have taken the same action for other reasons despite the employees' union or protected activity? The issue here again is intent, normally proved by circumstantial evidence. It is not enough for an employer to prove that it could or might have taken a disciplinary action for an alleged employee offense. In the event that the General Counsel has made out a prima facie case, the Employer must convince the trier of fact to believe its assertion that it would have taken the action notwithstanding the employees' union or protected activity. Therefore, the trier of fact does not substitute his or her own judgment as to what business actions are appropriate by a reasonable employer. He or she determines *whether or not to believe* the Employer's asserted business justification. If the asserted reason is absurd, manifestly false, contradictory, highly unreasonable, or unlikely, the trier of fact can reasonably conclude that the person stating the reason is not telling the truth. And in this regard, the administrative law judge who is the trier of fact in cases before the NLRB acts essentially in the same role as the members of a jury do when deciding the factual questions in a civil action.

Here, the General Counsel has offered substantial evidence showing the Employer's knowledge of the union activities of Joya and Hernandez. She has also offered substantial evidence to show the Employer's animus to employee activities supporting the organizational efforts of Local 32BJ.

In the present case, there were two events leading up to the discharges. One involved and incident between Riano and another employee named Marcia Reyes that occurred on Friday, October 10, 2003. The other involved the fact that on Monday afternoon, October 14, 2003, employees, including Joya, Hernandez, and Reyes, participated in leafleting activity in the parking lot.

With respect to the events on Friday, the credible evidence shows Reyes refused to follow Riano's instructions and that she called him names, including "maricone," which for Spanish-speaking men (having an overblown concern about machismo), seems to be the worst thing one person can call another. Although the General Counsel asserts that the events involving Reyes are not relevant to the discharges of Joya and Hernandez, I think that she is incorrect as it was this incident on Friday, that set the stage for and may very well have influenced the mind set of Riano on Tuesday.

Concerning Monday, there are a few facts that are not in dispute. First, some employees including Joya, Hernandez, and Mendoza participated in leafleting activity outside in the parking lot during the afternoon and before their shift started. As noted above, I have already concluded that Riano came out and told them that they should not be doing this as they were on private property. They continued despite his statements. The second is that at some point after the shift started, Joya asked Riano if she was going to get a raise for cleaning the bathrooms. And the third is that there was a blowup.

The first scenario is that Joya, emboldened by her leafleting activity on October 14, demanded that Riano give her an answer to her previously requested wage increase and that when he refused to do so, she flew off the handle and started yelling at him. In this scenario, Hernandez rushed to Joya's aid, whereupon the two of them proceeded to humiliate Riano in front of the other employees by calling him names including "maricone," and thereby leading him to believe (keeping in mind his Friday experience with Reyes), that he no longer could command the respect of or control of the employees.

The second scenario is that Riano, upset by the leafleting activity that took place earlier that afternoon and miffed by the employees' ignoring his direction to leave, overreacted to Joya's request for a pay increase and started yelling at her; not because she was asking for a raise but because of the union activity that she and the other employees were engaged in. In this scenario, Joya and Hernandez merely responded to Riano's intemperate outburst.

There is no definitive test by which either I or anyone else can determine which of these two scenarios is substantially true. Each person involved, asserts that he or she was the soul of reasonableness and never raised his or her voice. Each ascribes the outburst to the other. And neither version is free from doubt.

On the basis of the record as a whole, including demeanor considerations, I am going to credit the version given by the employees and discredit the uncorroborated version given by Riano. That does not mean that I make this finding with a high degree of certainty. But on the whole, at least 51 percent of me believes that the employees' version of these events is correct. I therefore conclude that it was Riano and not Joya, who initiated the yelling match in response to her request for a raise. Although her request for a raise was a personal one and not a concerted matter, I am inclined to believe that Riano's overreaction to her request was motivated by his displeasure with her and Hernandez' union leafleting activity that took place earlier in the day. I do not credit his assertion that either Joya or Hernandez engaged in the yelling and cursing that he attributed to them.

In view of the legal standard set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert.

denied 455 U.S. 989 (1982), I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging Ana Joya and Sandra Hernandez.

CONCLUSIONS OF LAW

1. The Respondent, North Hills Office Services, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Service Employees International Union, Local 32BJ, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to discharge or impose other reprisals on employees or by discharging Ana Joya and Sandra Hernandez because of their union membership, activities, or support, the Respondent has violated Section 8(a)(1) and (3) of the Act.

4. By interrogating employees about their union membership or activity, the Respondent has violated Section 8(a)(1) of the Act.

5. By issuing warnings to employees because of their union activities or support, the Respondent violated Section 8(a)(1) and (3) of the Act.

6. By directing employees to remove union T-shirts and requiring them to wear company uniforms that substantially obscured the union T-shirts, the Respondent has violated Section 8(a)(1) of the Act.

7. By requiring employees to take separate lunchbreaks in order to discourage them from engaging in union activities, the Respondent has violated Section 8(a)(1) of the Act.

8. By prohibiting employees from talking to each other during working hours, the Respondent has violated Section 8(a)(1) of the Act.

9. By directing off duty employees not to engage in union leafleting activity in the parking lot, the Respondent has violated Section 8(a)(1) of the Act.

10. By publishing in its newsletter statements regarding an alleged attempt by Local 32BJ to report employees to the Immigration and Naturalization Service, the Respondent violated Section 8(a)(1) of the Act.

11. By giving wage increases to employees in order to induce them to refrain from joining or assisting Local 32BJ, the Respondent violated Section 8(a)(1) of the Act.

12. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

13. Except to the extent found herein, I recommend that the other allegations be dismissed.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily issued warnings to and discharged certain employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I further recommend that the Respondent be required to expunge from its records any reference to the unlawful discharges and warnings.

[Recommended Order omitted from publication.]